SUPREME COURT OF THE UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, *v.* THE CITY OF RICHMOND.

(No. 195.—October Term, 1911.)

[April 1, 1912.]

1. **Telegraphs and Telephones—Municipal Corporations—Constitutionality of Restrictions on Use of Streets—Regulation of Poles and Wires—Underground Conduits.**—The Act of Congress of July 24, 1866 (Rev. Stat., §§ 5263, etc.), is only permissive, not a source of positive rights, and gives the telegraph company accepting its provisions no right to use the soil of the streets, even though post roads, as against private owners or as against the city or state where it owns the land.

2. **Same—Ordinance Delegating Discretionary Powers to City Officers.**—A city ordinance empowering certain city officers to exercise their judgment on the suitableness, safety, etc., of the poles and wires to be placed in the streets by the telegraph company, and their location, is not invalid as subjecting the telegraph company to an arbitrary discretion.

3. **Same—Taking Property without Due Process of Law.**—As the act of congress in question conveyed no title, such an ordinance cannot be said to take property without due process of law.

4. **Same—Imposition of Conditions.**—Assuming that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles, it may demand, as a condition of its assent to the use of its streets by such telegraph company, that positions shall be reserved upon the poles for the city, and that provision shall be made for 30 per cent increase, and that the city's wires shall be carried free of charge in such conduit, one duct being reserved for them.

5. **Same—Reservation of Places in Conduit for Third Persons.**—Such a regulation is not unreasonable, being to require that a single conduit should contain all the wires under a street.

6. **Same—Moving or Altering Conduits.**—A provision for moving or altering conduits at the company's expense upon notice from the city that the change is necessary for the construction or repair of gas, sewer or water mains, is as easily justified as the order to put the wires under ground, the legality of which is admitted.

7. **Same—Charges for Use of Streets.**—A money charge of two dollars per pole and the same sum per mile of underground wire cannot be held unreasonable, especially as the company has paid the charges for many years without complaint.

8. **Same—Penalties for Violation of Ordinance.**—Such ordinance cannot be held void because of the great penalties that may be incurred in the time necessary to test its legality, where it does not

appear that such penalties were intended to prevent resort to the federal courts, and no attempt is made to enforce them in respect to the past. The penalties are separable from the rest of the ordinance and if an oppressive application of them should be attempted, that will be time enough to object thereto.

9. Limitation of Privilege as to Time.—The fact that such ordinance limits the privilege as to conduits to 15 years and provides that thereafter the city may put such restrictions, conditions and charges as it sees fit, or may order the conduit removed, is not an attempt to make the telegraph company contract itself out of the benefit of the act of congress in question.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity filed on June 21, 1904, to restrain the enforcement of an ordinance of September 10, 1895; codified as chapter 88 of the ordinances of Richmond, and amended March 15, 1902, and December 18, 1903. The plaintiff alleges that the ordinance infringes its rights under the act of July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stats. §§ 5263, *et seq.*,) and under Article I, section 8, (the commerce clause,) and the Fourteenth Amendment of the Constitution of the United States. The Circuit Court dismissed the bill, 178 Fed. Rep. 310, and the plaintiff appealed. The act of Congress gives to telegraph companies that accept its provisions the right to construct, maintain and operate lines over the post roads of the United States, such as the streets of Richmond concerned are admitted to be. Rev. Stats. § 3964. Act of March 1, 1884, c. 9, 23 Stat. 3. Some of the objections to the ordinance are based upon this statute and some are not; we take them as they come.

By § 1 poles and wires are not to be put up "until the City Engineer shall have first determined the size, quality, character, number, location, condition, appearance, and manner of erection of" the same. By § 4 the Committee on Streets may require permission to be given to others to place upon the poles light current wires which in the Committee's opinon will not unreasonably interfere with the owners' business; terms, if not agreed upon, to be submitted to arbitration. By § 15 the Chief of the Fire Department and the Superintendent of Fire Alarm and Police Telegraph are to inspect poles and wires, and if a pole is unsafe, or the attachments, or insulations, etc., are unsuitable or unsafe, are to require them to be altered or replaced and removed, with a fine for each day's failure to obev the order. By § 26 violation of any provisions, or failure to obey any requirement made under the ordinance by the City Engineer or the just named Superintendent or Chief, if not specially fined, is to be

fined from ten to five hundred dollars a day, by the Police Justice. Finally by § 28, as amended in 1903, all overhead wires within a certain territory are to be removed, and within two months plans for conduits are to be submitted to the Committee on Streets and Shockoe Creek, showing location, plan, size, construction and material. These plans may be altered or amended by the Committee and when satisfactory to it are to be followed by the owner of the wires in a manner satisfactory to the City Engineer. The pavements are to be replaced and kept in repair to his satisfaction and the city saved harmless from damages. The conduits are to provide for an increase of 30 per cent, not to be occupied by third parties without consent of the Committee and compensation, but the wires of the city to be carried free, one duct being reserved for them. The location, size, shape and subdivision of the conduits the material and manner of construction, must be satisfactory to the City Engineer, and the work of laying underground conduits is to be under the direction and to the satisfaction of the Superintendent of fhire Alarm and Police Telegraph.

All these provisions are objected to as subjecting the appellant to an arbitrary discretion—in § 1, that of the City Engineer as to the poles; in § 4, that of the Committee on Streets as to the use of the poles; in § 15, that of the Chief and Superintendent mentioned as to not only the safety of the poles and wires but the unsuitableness of the latter or their attachments, insulation, or appliances; in § 28, that of the Committee on Streets as to underground plans, that of the Superintendent of Fire Alarm as to laying the conduits, and that of the City Engineer as to the replacement of pavement in the streets, and the carrying out of the plans in all the details just stated. It is argued also that by § 26 the appellant is subjected to further requirements without limit from the officers named, but this argument may be dismissed, the requirements referred to being only those "made under this chapter," that is, specifically authorized in the other sections to which we have referred. Again the objections are not to be fortified by those decisions that turn on the power to delegate legislative functions. United States *v.* Grimaud, 220 U. S. 506. We have been shown no ground for supposing that the ordinance exceeded the power of the legislature to authorize or of the city to enact, unless it interferes with some special paramount right of the appellant. The bill is brought wholly on the ground that the appellant has such rights that no State legislation can touch. Unless it has them there is nothing in the Constitution of the United States to prevent the grant of these discretionary powers to the committees and officers named. Davis *v.* Massachusetts, 167 U. S. 43. Gundling *v.* Chicago, 177 U. S. 183. Fischer *v.*

St. Louis, 194 U. S. 361, 371. Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 225.

The appellant says that it has the right to occupy the streets of Richmond under the Act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. To begin with the end, while it is true that rules are not laid down in terms, they are implied so far as there need to be any. If the Committee and officers do their duty there is no room in the questions left to them for arbitrary whim. They are to exercise their judgment on the suitableness, safety, &c., of the places, poles and wires by the criteria that would be applied by all persons skilled in such affairs who should seek to reconcile the welfare of the public and the instalment of the plant. The objection that other motives may come in is merely that which may be made to all authority, that it may be dishonest, an objection that would make government impossible if it prevailed. It is said that the ordinance should confine the Committee and officers to finding whether required and specified facts exist. But not only is it impossible to set down beforehand every particular fact that may have to be taken into account, but in case of dishonesty it would do no good. We are of opinion that the ordinance is not unreasonable as a grant of arbitrary power. Regulations very like these were upheld, so far as they presented Federal questions, against a company assumed to have a right to use the streets, in Missouri, ex rel. Laclede Gaslight Co. *v.* Murphy, 170 U. S. 78, 99. See also Wilson *v.* Eureka City, 173 U. S. 32.

In view of what we have said and the appellant's admission that it is subject to reasonable regulation it would be unnecessary to consider its rights under the act of Congress but for some further complaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has. The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. Western Union Telegraph Co. *v.* Pennsylvania Railroad Co., 195 U. S. 540, 574. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1. It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530. But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the ap-

pellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or State where it owns the land. St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92, 101. S. C. 149 U. S. 465. Richmond *v.* Southern Bell Telephone & Telegraph Co., 174 U. S. 761, 771. Atlantic & Pacific Telegraph Co. *v.* Philadelphia, 190 U. S. 160, 163. Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 357.

The only ground of title disclosed by the appellant is the act of 1866, coupled perhaps with the fact that its lines are established. The rights of the city to the streets are left a little vague, but the bill assumes that they are such as to authorize the charge of a reasonable rental on the principle of St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92. Any license that the city may have granted as owner or representative of the owner of the public easement or otherwise may be assumed to have been revoked, and so far as the city's title is infringed by the appellant nothing appears to limit the city's right to insist upon it, as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights.

When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, prima facie it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. If it demands, as a condition of its assent, as it does by § 6, that positions shall be reserved upon the poles for the city, and by § 28 that provision shall be made for thirty per cent increase and that the city's wires shall be carried free of charge, one duct being reserved for them, it is within its rights. Even assuming, as seems to be implied by some of the language in St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92, 104, 105, Western Union Telegraph Co. *v.* Attorney-General of Massachusetts, 125 U. S. 530, that in consequence of the act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties. The city must use these poles and conduits or others, and it is not unfair that it should avoid the expense and additional burden of a separate system and insist on getting the help it needs from the system already there. See Postal Telegraph Cable Co. *v.* Chicopee, 207 Mass. 341. It is no sufficient objection that from the point of view of rental the burden on certain

poles may vary in a proportion different from the value of those poles. The notion of rental cannot be used thus to restrict the conditions that may be imposed. The conditions are reasonable with reference to the occupation of the streets considered as a whole, and are not made otherwise by the fact that there is also a specific money charge for each pole or underground mile of wire.

The requirement that space be left in the conduits for wires of third parties, to be used upon permission by the city and compensation, §§ 4, 28, is merely another incident of the necessity for insisting upon a single system. It would seem not to be unreasonable for legislation, apart from any question of property rights, to require that a single conduit should contain all the wires under a street. When the legislature also is fixing the terms on which it will yield a property right the validity of the condition becomes doubly clear. So a provision in § 28 for moving or altering conduits at the appellant's expense upon notice from the city that the change is necessary for the construction or repair of gas, sewer, or water mains. These items seem to us as easily justified as the order to put the wires underground, the legality of which the appellant fully admits.

The money charges of two dollars per pole and the same sum per mile of underground wire, are found fault with. §§ 10, 32. Many of the cases relied upon by the appellant are cases turning on the limitations to the powers of the municipality. But, as we have said, this bill is brought on the theory that any such legislation by the State would be bad under the Constitution and Act of Congress—not upon the suggestion that the City of Richmond is acting *ultra vires*. If the city could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question so limited, we agree with the court below that after the appellant, as is found, has paid the charges without complaint for many years it would require something more than a mere protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore. St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92, 104. S. C. 149 U. S. 465. Postal Telegraph Cable Co. *v.* Baltimore, 156 U. S. 210. Memphis *v.* Postal Telegraph & Cable Co., 164 Fed. Rep. 600, 91 C. C. A. 135.

There is the frequently recurring contention that the ordinance is void because of the great penalties that may be incurred in the time necessary to test its legality. Especially mentioned is § 27, as amended in 1902, which imposes a fine of from $100 to $500 for each pole remaining after the time set for their removal, and of from $100 to $500 for every week thereafter. It does not look as if the penalties in this ordinance were established with a view to prevent the appellant from resorting to the Fed-

eral Courts, nor do we apprehend that an attempt will be made to enforce them in respect to the past. But the penalties are saparable from the rest of the ordinance, and if an oppressive application of them should be attempted it will be time enough then for the appellant to file its bill. United States *v.* Delaware & Hudson Co., 213 U. S. 366, 417. Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433, 443.

One more objection to the ordinance is found in § 31, which limits the privilege as to the conduits to fifteen years and provides that after that time the city may put such restrictions, conditions and charges as it sees fit, or may order the conduits removed. It seems to be thought that this is an attempt to make the appellant contract itself out of the benefit of the Act of Congress. What we have said will show some reason for not so regarding the ordinance—and as an amendment, § 34, adopted since the bill was filed. provides that none of the obligations, &c., of the chapter shall interfere with rights under the Act of 1866, the appellant's position would be no worse by reason of its complying with what it cannot help. We think it unnecessary to discuss the bill in greater detail to show that it cannot be maintained.

Decree dismissing bill affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1068.

S. W. WASHINGTON AND GERARD D. MOORE, SURVIVING TRUSTEES IN BANKRUPTCY OF J. GARLAND HURST, BANKRUPT, Appellants, *v.* J. F. TEARNEY AND E. M. TEARNEY, SURVIVING EXECUTORS OF EDWARD TEARNEY, DECEASED, Appellees.

Bankruptcy — Fraudulent Conveyance — Distribution — Right to Fund Brought in by Setting Aside Conveyance—Rights of Fraudulent Grantee as to Debt Unconnected with Fraud—Estoppel of Trustees.—Where a fraudulent conveyance had been executed by a bankrupt nearly six years before he was adjudicated a bankrupt, and withheld from record until a few days before such adjudication, and such fraudulent vendee also held a large debt against the bankrupt unconnected with such fraudulent conveyance and contracted prior thereto, and this debt was proved and allowed in the bankruptcy proceeding, and subsequently, under the direction of the bankruptcy court, the trustees filed a bill in the state court to avoid the conveyance in question and "to recover the property thereby conveyed for the benefit of the creditors of the bankrupt estate," it was held that, because the trustees themselves asked the state court to de-